

NRDC

June 20, 2018

By FOIA Online

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
(202) 566-1667

Re: Freedom of Information Act Request for Records Relating to Lead and Copper Rule Compliance in Newark, New Jersey

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records¹ pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and applicable Environmental Protection Agency (EPA) regulations at 40 C.F.R. §§ 2.100-2.406. NRDC requests expedited processing of this request pursuant to 40 C.F.R. § 2.104(e)(1).

I. Description of Records Sought

Please produce any and all records in the possession, custody, or control of EPA dated January 1, 2015, or later that pertain to the compliance of the City of Newark, NJ, or the Newark Department of Water and Sewer Utilities (collectively, Newark), with the Lead and Copper Rule (LCR), 40 C.F.R. §§ 142.1 *et seq.*, and those portions of the Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f *et seq.*, which require monitoring, reporting, or controlling the concentration of lead in drinking water. This includes, but is not limited to, the following records:

1. Any records submitted to EPA pursuant to 40 C.F.R. §§ 142.14-.15 regarding Newark's compliance with the Lead and Copper Rule;

¹ "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, internal messaging systems, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). NRDC seeks responsive records in the custody of any EPA office, including, but not limited to, EPA Headquarters and the EPA Region 2 office.

2. All records, including but not limited to any emails, notes, presentations, briefing materials, or summaries created by EPA or state or local government employees related to lead contamination in Newark's drinking water;
3. All records created by EPA or state employees, specific to Newark's compliance with the LCR, in response to the February 29, 2016 letter from EPA requesting action to enforce the LCR. *See* EPA, *Sample Letter to Commissioners* (Feb. 29, 2016), <https://www.epa.gov/sites/production/files/2016-03/documents/samplelettercommissionersfeb2016.pdf>; and
4. All records, including but not limited to emails, agendas, minutes, attendee lists, presentations, and materials prepared for or transmitted in relation to meetings, whether before, during, or after the meeting itself, relating to the Newark's compliance or noncompliance with the requirements of the LCR.

II. Request for a Fee Waiver

NRDC requests that EPA waive any fee it would otherwise charge for the search and production of the records described above. FOIA provides that a request is entitled to a fee waiver when "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1). The requested disclosure would meet both requirements.

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure here is "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). Each of the four factors used by EPA to evaluate the first fee-waiver criterion has been met. *See* 40 C.F.R. § 2.107(l)(2).

1. The subject of the request concerns identifiable government operations or activities.

The records requested here pertain to additional information that EPA might have about Newark's LCR compliance. Under the SDWA, EPA is tasked with setting standards for drinking water quality which are then implemented by the state and local governments. 42 U.S.C.A. § 300g. As part of this process, the EPA "collects drinking water data[] and oversees state drinking water programs." U.S. Env'tl. Prot. Agency, *Understanding the Safe Drinking Water Act* (June 2004), <https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf>. This request seeks any communication or reporting between the EPA and Newark or the state of New Jersey with respect to compliance with and subsequent violation of the LCR standards under the SDWA. Thus, the requested records directly concern "the operations or activities of the government." 40 C.F.R. § 2.107(l)(2)(i).

2. The requested records would be meaningfully informative about government operations or activities.

The requested records are “likely to contribute to an understanding of government operations or activities.” 40 C.F.R. § 2.107(*I*)(2)(ii) (internal quotation marks omitted). These records are not currently in the public domain. Thus, this request is not “duplicative or [in] a substantially identical form” such that dissemination of this information would be redundant. 40 C.F.R. § 2.107(*I*)(2)(ii). The public only has access to the records that the state of New Jersey makes public. However, there might be additional violations that the records reported to EPA could reveal. As such, these records are likely to contribute to knowledge of Newark’s operations or activities with respect its implementation and violation of the LCR standards.

Furthermore, these records would be “meaningfully informative about government operations or activities” such that it would contribute to an “increased public understanding” of Newark’s non-compliance with federal mandates set by the EPA under the SDWA. 40 C.F.R. § 2.107(*I*)(2)(ii). Water sampling records from Newark last year “showed lead contamination in excess of 26.7 parts per billion, above the federal action level of 15 parts be billion.” Kate King, *Newark Water Tests Show High Lead Levels, Prompting Threat of Lawsuit*, WALL ST. J. (Apr. 24, 2018, 6:37 PM), <https://www.wsj.com/articles/newark-water-tests-show-high-lead-levels-prompting-threat-of-lawsuit-1524609430>. Lead is a “toxic metal that can be harmful to human health even at low exposure levels.” *Basic Information About Lead in Drinking Water*, U.S. ENVTL. PROT. AGENCY <https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water#health> (last visited Jun. 7, 2018). This is exacerbated in children and fetuses, and the EPA has found that there “no known safe level of lead in a child’s blood.” *Id.*

Given the harmful levels of lead already shown by the reporting data from the city of Newark, it is in the public’s interest to understand what information was communicated to EPA with respect to lead contamination levels. Disclosure of this information is relevant to understanding what additional LCR violations may have occurred in Newark. This constitutes meaningful information about government activities.

3. Disclosure of the records would likely contribute to an understanding of the subject by the public.

NRDC has the ability to disseminate records with any relevant information from the requested disclosure to a broad audience of interested persons. *See* 40 C.F.R. § 2.107(*I*)(2)(iii). NRDC has extensive communications capabilities and a proven history of disseminating information for the public’s interest, including information obtained from FOIA records requests. It is very likely that disclosing this information will “contribute to the understanding of a reasonably broad audience of persons interested in the subject.” 40 C.F.R. § 2.107(*I*)(2)(iii). Given the high number of NRDC’s information-sharing channels, there is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers

demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC frequently shares newsworthy information with the public for free, and does not intend to resell the information requested here. NRDC has more than three million members and online activists, who are a sufficiently “broad audience of persons interested in the subject” of environmental issues including lead in drinking water. *See* 40 C.F.R. § 2.107(l)(2)(iii). This has been especially true after the crisis in Flint, Michigan, which garnered substantial interest among NRDC members. Given the magnitude of NRDC membership and other potential communication methods, the audience of interested persons to be reached is “reasonably broad.” 40 C.F.R. § 2.107(l)(2)(iii).

As NRDC’s long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well-prepared to share any relevant information it obtains through this records request with the public. NRDC can disseminate information from this FOIA request through many channels. These include, but are not limited to, the following:

- NRDC’s website, available at <http://www.nrdc.org>, which is updated daily and features NRDC staff blogs, original reporting of environmental news stories, and more;
- NRDC’s Activist email list includes more than three million members and online activists who receive regular communications on urgent environmental issues. This information is also made available through NRDC’s online Action Center at <https://www.nrdc.org/actions>;
- NRDC’s social-media accounts, some of which have hundreds of thousands of followers: Facebook, Twitter, Instagram, YouTube, and LinkedIn;
- NRDC’s press releases, issue papers and reports; and
- Movies directed or produced by NRDC.

Furthermore, NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public’s understanding of the subject. *See* 40 C.F.R. § 2.107(l)(2)(iii).

4. The public’s understanding of the subject matter would be significantly enhanced by the disclosure.

Finally, this “disclosure is likely to contribute significantly to public understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(iv). The requested records shed light on a matter of considerable public interest and concern: lead contamination in Newark. Disclosure would help the public more effectively evaluate factual bases for the safety concerns posed by the lead contamination in Newark.

B. NRDC Satisfies the Second Fee Waiver Requirement

Second, NRDC has no commercial interests that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1), (3). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. Access to government records, disclosure forms, and similar materials through FOIA requests is essential to NRDC's role of educating its members, activists, and the general public. NRDC has no commercial interest in the disclosure of the records, and it will realize no "economic return" from the disclosure of the requested records. 40 C.F.R. § 2.107(l)(3). NRDC seeks to serve the public by reviewing, analyzing, and disclosing important and presently non-public information about the subject of this request.

C. NRDC Is a Media Requester

Even if NRDC were not entitled to a public interest waiver of all costs and fees, it would be a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and EPA's FOIA regulations, 40 C.F.R. § 2.107(c)(1)(iii); *see also* 40 C.F.R. § 2.107(b)(6) (defining "[r]epresentative of the news media"). A representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a "non-profit public interest organization" qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep't of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (Att. 11) (granting NRDC media requester status).

NRDC is in part organized and operated to gather and publish or transmit news to the public. For example, NRDC publishes original reporting of environmental news stories on its website, <http://www.nrdc.org>. Previously, NRDC published stories like these in its magazine, *OnEarth*, which has won numerous news media awards, including the Independent Press Award for Best Environmental Coverage and for General Excellence, a Gold Eddie Award for editorial excellence among magazines, and the Phillip D. Reed Memorial Award for Outstanding Writing on the Southern Environment. As explained in Part II.A, NRDC also publishes a regular newsletter for its more than three million members and online activists. *See* 40 C.F.R. § 2.107(b)(6) ("Examples of news media include . . . publishers of periodicals."). NRDC also maintains a significant additional communications presence through its staff blogs on www.nrdc.org, which are updated regularly and feature writing about current environmental issues, through daily news messaging on Twitter and Facebook, and through content distributed to outlets such as Medium. *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that "as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities"). These and the other communications channels referenced earlier in this letter routinely include information about current events of interest to the readership and the public. NRDC employs more than fifty specialized communications staff, including accomplished journalists and editors,

and numerous other advocates able to disseminate, through these and other channels, newsworthy information acquired through FOIA.

Organizations with NRDC's characteristics "are regularly granted news representative status." *Serv. Women's Action Network v. Dep't of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union); *see also Cause of Action v. Fed. Trade Comm'n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it "distributes work to an audience and is especially organized around doing so").

III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. To expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with EPA's FOIA regulations at 40 C.F.R. § 2.107(c)(1)(iv) for all or a portion of the requested records. *See* 40 C.F.R. § 2.107(c)(1)(iv). Please contact me before doing anything that would cause the fee to exceed \$200. NRDC reserves the right to seek administrative or judicial review of any fee waiver denial.

IV. Request for Expedited Processing

Lastly, NRDC seeks expedited processing for this request. This request "involve[s] a compelling need" such that expedited processing would be appropriate. 40 C.F.R. § 2.104(e)(1). Given the significant public health risk that additional violations of the LCR create for the residents of Newark, this request is a matter of "an imminent threat to the life or physical safety" of the public. 40 C.F.R. § 2.104(e)(1)(i). Lead is so toxic that EPA has set the "maximum contaminant level goal for lead in drinking water [to] zero." *Basic Information About Lead in Drinking Water*, U.S. Env'tl. Prot. Agency <https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water#health> (last visited June 7, 2018). Lead exposure is a particularly serious issue for children and even at low levels can substantially impair their development. *Id.* Lead poisoning can also endanger adults, causing decreased kidney function and cardiovascular risks, among other symptoms. *Id.* Furthermore, "[l]ead is persistent, and it can bioaccumulate in the body over time," *id.*, meaning that prolonging exposure for any amount of time has potential long-term health impacts.

The need for more information about LCR violations in Newark is especially pressing given that reports from 2016 showed high levels of lead in thirty Newark schools. *See, e.g.,* Tom Johnson, *Lead Scare Over Water in Newark School's Underscores NJ's Toxic Problem*, NJ Spotlight (Mar. 10, 2016), <http://www.njspotlight.com/stories/16/03/09/lead-scare-over-water-in-newark-schools-reinforces-nj-s-toxic-problem/>. Understanding the totality and pervasiveness of the LCR violations in Newark is essential to addressing these safety concerns at the city-level. NRDC believes that reporting data from EPA may shed light on other dangerous LCR violations that have occurred in Newark. This alone demonstrates a need for expedited processing.

Furthermore, the requested records will be used to "disseminat[e] information to the public" about a federal government activity. 40 C.F.R. § 2.104(e)(1)(ii). EPA's monitoring of

state SDWA enforcement is a key element of the primacy regime. The efficacy of this monitoring is of urgent concern to the public, as lead contamination of drinking water is an increasingly visible threat. As noted in previous sections of this request, NRDC's core mission includes sharing information about environmental issues with the public. This is done without economic gain and is solely for the public's benefit. Dissemination of information from EPA pertaining to its monitoring of New Jersey's LCR enforcement will give the residents of Newark and the U.S. public a better sense of the lead-contamination risks they may face. This information will also enable local, state and national organizations to put pressure on Newark to promptly address these health concerns.

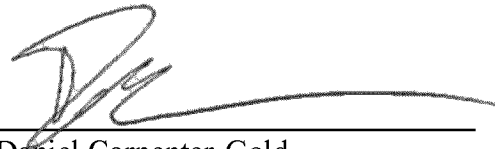
These two justifications satisfy the statutory requirements NRDC's request for expedited processing.

V. Conclusion

Please email, or if it is not possible to email, mail, the requested records to me at the NRDC office address listed below. Please provide them on an expedited basis. EPA's search for, or deliberations concerning, certain records should not delay the production of others that EPA has already retrieved and elected to produce. *See generally* 40 C.F.R. § 2.104 (describing response deadlines). If EPA concludes that any of the records requested here are publicly available, please let me know.

Please do not hesitate to call or email with questions. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Gold', with a long horizontal line extending to the right.

Daniel Carpenter-Gold
Attorney
Natural Resources Defense Council
40 West 20th Street, 11th Floor
New York, NY 10011
(212) 727-4656
dgold@nrdc.org

Enclosures (by FOIA Online): Attachments 1 through 30